Ameritech also has refused to implement the proper interconnection arrangements. In Illinois, TCG was certificated to operate as a LEC on September 7, 1994.[30] Ameritech, however, refused to interconnect with TCG, forcing TCG to file a complaint with the Illinois Commerce Commission on November 15, 1994.[31] On April 7, 1995, the Illinois Commission issued its Local Competition Order which mandated interconnection.[32] Forty-five days later, Ameritech filed an interconnection tariff which was not in compliance with the Commission's Order. TCG, AT&T, MFS and MCI responded by filing a protest which is still pending before the Illinois Commission. TCG has since been operating in Illinois under an unsatisfactory interim arrangement which does not satisfy the requirements of §252(d)(2) of the 1996 Act.[33]

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30. Illinois Commerce Commission Order, Dkt. No. 94-0162.

31. *TC Systems-Illinois, Inc. v. Illinois Bell Telephone Company*, Illinois Commerce Commission Docket No. 94-0457 (Complaint Filed on November 15, 1994).

32. *Illinois Bell Telephone Company Proposed Introduction of a Trial of Ameritech's Customer First Plan in Illinois*, Docket Nos. 94-0096, 94-0117, 94-0146, 04-0301 consol. (Illinois Commerce Commission, April 7, 1995).

33. TCG has experienced similar difficulties in other states. In Michigan, TCG was certificated to provide basic local exchange services on April 27, 1995 in Michigan Public Service Commission Case No. U-10731. On September 27, 1995, TCG and Ameritech entered into an interim interconnection agreement. TCG, however, is still not fully operational in Michigan due to the refusal of Ameritech to timely implement the agreement, and despite the local competition order of the Michigan Public Service Commission in Case No. U-10647, which has recently been partially codified in the Michigan Telecommunications Act. (*See, e.g.*, Mich. Comp. Laws §484.2352 (1995)). In Wisconsin, TCG is still not fully operational despite being certificated on October 27, 1995 (in Public Service Commission of

In every instance, the RBOCs have succeeded in alleging "technical difficulties" or interposing unreasonable and inflexible negotiating positions that have succeeded in delaying implementation of even barely workable interconnection arrangements by many months or even years. However, given that ILECs interconnect among themselves successfully every day, and have done so for decades, it is difficult to agree that there are any technical "breakthroughs" necessary for a CLEC's switch to communicate with an ILEC's switch. Additionally, the RBOCs present "hidden charges" at every step of the way which escalate the price for competitive entry, and frustrate the effort of some state commissions to provide for an economically feasible local competitive environment.

Other ILEC initiatives also raise the risk that the competitive playing field will be tilted against the new competitors. Ameritech has established a so-called "separate" subsidiary called Ameritech Communication, Inc. (ACI) to provide bundled resold local and intraLATA toll services. In the long run, Ameritech claims that ACI intends to become a facilities-based local exchange provider and obtain approval from the Commission to provide in-region long distance service as well. The existence of ACI, however, raises a risk that Ameritech Michigan will discriminate in favor of its affiliate by providing more favorable rates, terms, and

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Wisconsin Docket No. 5837-NC-100), and despite signing an interim interconnection agreement with Ameritech on January 23, 1996. In Texas, while TCG was certificated on February 23, 1996 (in Public Utility Commission of Texas Docket Nos. 14633 and 14634), there is no indication when TCG will ever be interconnected with Southwestern Bell Telephone Company, given its hostility to competition. *See* n. 11, *supra.*

conditions for interconnection arrangements, wholesale resale services, and unbundled network elements. This concern is magnified by irrefutable evidence of record in ACI's application that Ameritech has cross-subsidized ACI's start-up costs to the tune of some $90,000,000.[34] In addition to immediate and favorable resale and interconnection arrangements with Ameritech, ACI will be able to price below cost as a result of subsidies from ACI's parent.

Finally, ILECs use (or abuse) their ordering and provisioning processes to introduce a whole new set of delays, thereby discouraging the customers of CLECs from subscribing to their services. ILECs have insisted on manual ordering processes for CLEC requests, while using faster and more efficient electronic ordering processes for their own customers. ILECs have also required needlessly expensive and time consuming ordering processes for CLECs -- insisting, for example, that a CLEC issue hundreds of new orders affecting all of the circuits in a multiplexer group, even though the CLEC is only seeking to change a single circuit on the multiplexer. Given the range of anticompetitive devices that ILECs can deploy to frustrate competition, clear standards are necessary to ensure fairness.

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34. *See Application of Ameritech Communications, Inc. for a License to Provide Basic Local Exchange Service to Ameritech Michigan and GTE North, Inc. Exchanges in Michigan*, Michigan Public Service Commission Case No. U-11053. The testimony of ACI's Vice President of Finance states that in the state of Michigan alone Ameritech's absorption of ACI expenses is at a minimum $90 million. (Tr. pp. 425-427, April 25, 1996).

C. What constitutes a "technically feasible point"? What have other states required? Should states be allowed to designate additional technically feasible interconnection points? (NPRM ¶¶56-59)

TCG strongly supports the Commission's tentative conclusion that, for purposes of the 1996 Act, an interconnection point should be considered "technically feasible" if an ILEC currently provides (or has provided) interconnection to any other carrier at such a point. Such a definition would compel the ILECs to interconnect under any arrangements currently available and endorses the requirements set forth in many states.[35] For purposes of this definition, however, the Commission should make clear that the reference to "points" where interconnection has taken place is functional in nature, rather than geographic. Thus, an interconnector should not be limited to interconnecting at the same physical locations where other parties have previously connected, but rather should be permitted to interconnect at the same functional network points as have been previously used.[36]

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35. *See generally*, Washington Utilities and Transportation Commission, *Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, in Part*, (October 31, 1995), Dkt. No. UT-941464; Oregon Public Utilities Commission, Order No. 96-012, (Jan. 12, 1996), Dkt. Nos. CP-1, CP-14, CP-15.

36. Thus, if (for example) an ILEC has allowed other ILECs to interconnect to its Midtown tandem switch at a mid span meet at a manhole at First and Main, CLECs should not be limited to only interconnecting to that tandem in the same manhole (it could get crowded) but rather should be allowed to interconnect to all of the ILEC's tandem switches using comparable mid-span meet arrangements.

TCG believes that CLECs will need several options for interconnection, depending on such factors as the nature of their services, the size and density of the market, the maturity of the CLEC, their network architectures, and the purposes of the interconnection. Again, a "one size fits all" model for interconnection points would be both unrealistic and anti-competitive. For example, physical collocation is an important interconnection option, particularly when a new entrant intends to offer services through the use of the incumbent's unbundled loops. Virtual collocation is a necessary option when there are space limitations or when it may be too costly to implement physical collocation. Mid-span meet interconnections are a particularly appropriate form of interconnection for "switch to switch" connections, as are needed for the Transport and Termination of local traffic.[37] Therefore, under the Commission's proposed definition, physical, virtual, and mid-span meet interconnections are technically feasible and *all* ILECs should be required to provide such forms of interconnection at the option of the CLEC.

TCG, therefore, supports the Commission's proposal to define "technically feasible" points as interconnections which an ILEC currently provides, (or has provided) to any other carrier. In addition. TCG supports the Commission's

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37. The telephone industry historically has exchanged switched traffic between adjoining telephone carriers using mid-span meet type arrangements for many years, demonstrating that this option is a proven and attractive interconnection approach. ILECs currently provide some or all forms of these interconnections.

conclusion that, as technology further develops, the number of functional points at which interconnection is feasible may change and minimum federal standards should change accordingly. The Commission's definition, since it is linked to the actual provision of interconnection in the network, will naturally adapt as changing technology adds new points of interconnection.

D. Should LECs be required to meet performance standards for installing or repairing interconnection facilities and pay liquidated damages for failure to meet standards? (NPRM ¶ 61)

ILECs must be required to meet specified performance standards, such as installation intervals, mean times to repair, service availability standards, and similar performance criteria. There must be financial penalties for failure to meet these standards, similar to the installation guarantees that ILECs already offer to their retail customers if they fail to timely make an appointment or install a service.

Once RBOCs obtain an interconnection agreement and permission to enter into long distance markets, they will have little incentive to achieve reasonable service standards. TCG has been experiencing problems with service quality, ILEC resistance to the implementation of interconnection arrangements, and a host of other problems which it has brought to the attention of regulatory commissions but with little effect.[38] , Accordingly, CLECs need a self policing, self-executing remedy for poor ILEC performance.

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38. *See* fns. 11, 20, 21, 25, 26, 29, 31, 33.

III. COLLOCATION AND MID SPAN MEET ARRANGEMENTS

A. Does the Commission have the authority to require physical and virtual collocation and Mid Span Meet arrangements? (NPRM ¶¶64-65)

TCG believes that the Commission clearly possesses the authority to order mid-span meet type interconnection arrangements,[39] as well as physical and virtual collocation arrangements.

With respect to mid-span meets, It is clear from the 1996 Act that ILECs are required to provide interconnection "at any technically feasible point within the carrier's network." ILECs also must offer interconnection that is "at least equal in quality to that provided by the [ILEC] to itself or to any subsidiary, affiliate, or any other party" and the "rates, terms and conditions" must be "just reasonable and nondiscriminatory." 1996 Act, §252(c)(2).

ILECs today provide interconnection to one another using mid-span meet type arrangements. This is clear from the fact that calls can be seamlessly completed from one ILEC to another ILEC, and that ILECs have never, to TCG's knowledge, insisted that other ILECs use collocation arrangements. Instead, mid-

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39. "Mid-span meet" interconnection arrangements refer to situations in which two carriers each construct transmission facilities and arrange to interconnect them at a predetermined location, the "meet point." For example, two carriers using fiber optic facilities would arrange to construct their fiber optic cables to a meet point where the cables would be spliced together. The term "mid-span" refers to a common telephone industry practice of calling a section of a transmission facility, for example between two repeaters, a "span," so that an interconnection point that occurs within such a transmission facility is a mid-span meet.

span meet type arrangements are commonly and conveniently used, and under §251(c) the ILECs now have an obligation to offer such interconnection to other carriers. This obligation springs from the fact that mid-span meet interconnection is (1) technically feasible, (2) is provided to other carriers today, and (3) must be provided to other parties in order to avoid discrimination.

The Commission should require that ILECs interconnect using a mid-span meet arrangement at any point which a telecommunications carrier chooses, with the cost of the facility split between the two carriers, based on the proportion of the facility provided by each carrier.[40] TCG would suggest that the cost-sharing of a mid-span meet arrangement be limited to the first three miles from the switch location to which interconnection has been requested, in order to encourage CLECs to deploy facilities and maximize diversity and disaster avoidance.

This suggested policy is consistent with what the states are ordering. The Washington Utilities and Transportation Commission, for example, concluded that "[b]ased upon the record, it does not appear that physical interconnection between incumbent LECs and ALECs involves any unique technological problems that the

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40. The three mile limitation is intended to avoid situations where a carrier is obligated to construct lengthy facilities for purposes of interconnection, and parallels a similar provision in the Modified Final Judgment. *See* MFJ Appendix B, Part B(3) (five mile rule). Additionally, if the telecommunication company and the ILEC cannot agree upon the points of interconnection, the Commission should be notified as to why interconnection at the requested point is not feasible. Where the interconnection point is at a physical collocation arrangement, the carriers should pro-rate the relevant collocation charges to equalize the interconnection costs.

incumbents do not already face when interconnecting among themselves".[41] The Washington Commission also mandated that companies establish mutually agreed upon mid-span meet points for purposes of exchanging local and toll traffic.[42] The Oregon Public Utilities Commission also took this position, stating:

> "[A]pplicants should be permitted to interconnect with incumbent providers on the same terms and conditions that LECs have used to interconnect their telecommunications networks. This process contemplates that the interconnecting parties will negotiate mutually acceptable locations where network facilities can be joined. In some cases, carriers will decide that the most efficient connection will be at the end office of one of the carriers. In others, it may be more convenient and less costly to establish meet points to connect network facilities. Because these decisions will vary on a case-by-case basis, the parties are in the best position to determine the manner in which interconnection should take place."[43]

The Arizona Public Utilities Commission, in its proposed rules, similarly adopted a requirement for mutual interconnection. Its proposed interconnection rules would require that telecommunications companies interconnect at any mutually agreed upon point.[44] Arizona also required that the cost of the facility be equally shared by the two carriers.

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41. Washington Utilities and Transportation Commission, *Fourth Supplemental Order Rejecting Tariff Filings and Ordering Refiling; Granting Complaints, in Part*, (October 31, 1995), Dkt. No. UT-941464, p.45

42. *Id.* at 46.

43. *Application of Electric Lightwave, Inc., MFS Intelnet of Oregon, Inc., and MCI Metro Access Transmission Services, Inc.*, Public Utility Commission of Oregon Order, Order No. 96-021, (January 12, 1996), p. 68-69.

44. *Rules for Telecommunications Interconnection and Unbundling*, Arizona Corporation Commission Order, Decision No. 59483, (January 11, 1996), Proposed Rule R14-2-1303 (Attachment E hereto).

Many ILECs have argued that existing mid-span meet arrangements, and other ILEC to ILEC interconnection conventions, cannot be used in the future because today's arrangements involve ILECs whose territories do not overlap, whereas tomorrow's agreements involve carrier's whose serving areas may overlap. While it is true that some interconnection agreements involve carriers whose territories overlap while others involve carriers with contiguous territories, that fact is entirely irrelevant to the question of what interconnection arrangements should be made available to CLECs. Whether local exchange carriers have territories that overlap or are contiguous has absolutely nothing to do with the technical and operational characteristics of the traffic that must be exchanged between their switches. The interconnection trunk capacity that must be installed to handle a certain busy hour load on the network is the same whether the customers are in an adjoining territory or not.

The fact that such mid-span meet arrangements have been commonly and uncontestedly used for decades for the exchange of traffic between non-competing ILECs provides strong evidence that these arrangements -- as compared to the more complex, litigious, and contentious collocation arrangements -- are a competitively neutral model for the exchange of switched traffic between networks, and one that the 1996 Act requires be made available.[45]

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45. Section 251(c)(2).

With respect to physical and virtual collocation arrangements, the statute clearly grants the Commission authority to issue such rules. Section 251(c)(6) requires ILECs to offer physical collocation, with virtual collocation to be available where the ILEC demonstrates to the State Commission that physical collocation is not practical for technical reasons or space limitations. This Commission is required, under §251(d), to issue implementing rules, and within that context can certainly pronounce the rules that should govern the provision of physical and virtual collocation.

B. Should the Commission adopt national collocation rules that allow for some variation among states? Should the Commission readopt its prior standards governing physical and virtual collocation? (NPRM ¶¶ 67-68)

TCG supports the Commission's tentative conclusion to adopt a national standard where appropriate to implement the collocation requirements of the 1996 Act. While the Commission's basic, general standards for physical and virtual collocation have been sound in theory, ILEC interpretation of these standards has led to inefficient, costly and administratively burdensome arrangements.

The Commission should consider whether other approaches to collocation would improve upon its past results. TCG supports the NYPSC's standard for collocation:

> The interconnection arrangement must provide TCG with the same capability to connect its high capacity fiber optic network to the LEC's central office facilities and the LEC's ubiquitous low capacity loop network in a manner which is *technically, operationally and*

economically comparable to the way that the LEC connects its own high capacity facilities to the LEC central office facilities and loop network.[46]

The NYPSC's "comparably efficient interconnection" standard provides that TCG's fiber optic network should have the same connectivity to LEC central offices and the local loop network as enjoyed by the LEC's competing high capacity network facilities. This "comparably efficient interconnection" standard is essential if there is to be fair, effective and publicly beneficial competition between services provided over both access carriers' fiber networks. Additionally, the NYPSC standard would appear to be consistent with -- if not demanded by -- the requirements for nondiscriminatory interconnection found in §251(c)(2)(C).

As an interim matter, the FCC should immediately require all ILECs to refile their last FCC physical collocation tariffs, subject to investigation and an accounting order. This should be done on an expedited basis in order to prevent a "build up" of unwanted virtual collocation arrangements. At present, in most ILEC regions, ILECs continue to refuse to provide physical collocation arrangements, and have not refiled their prior physical collocation tariffs.[47] CLECs that need collocation arrangements are now forced to continue ordering inferior "virtual collocation" arrangements even though the ILECs have a legal duty to provide

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46. *See Opinion No. 89-12, Opinion and Order Concerning Regulatory Response to Competition, Case 294369, (May 16, 1989).* (emphasis added).

47. Among the major carriers, only NYNEX and Pacific Bell allow physical collocation.

physical collocation. By promptly requiring the re-filing of these prior rates, subject to the same accounting orders to which they were previously subject, the Commission can limit the complicated problems of transitioning from the virtual collocation arrangements to physical collocation arrangements once the physical arrangements are put in place.

The Commission should rule that CLECs should immediately be permitted to subcontract construction of physical collocation arrangements with contractors approved by the ILEC, thereby removing one of the most expensive items associated with physical collocation -- cage construction. The Commission should also require that the ILECs give interconnectors a credit against the non-recurring costs of physical collocation arrangements for any virtual collocation arrangements that they wish to convert to physical collocation, and not allow any non-recurring charges to be applied for the re-connection of existing interconnected services to a replacement physical collocation arrangement.

CLECs must have the ability to order physical collocation from ILECs at tandems and end offices. TCG supports the Commission's tentative conclusion which broadens the definition of a LEC premise to include all LEC buildings, structures or any other facility that could be interconnected on a technically feasible basis, given the limitations of §251(c)(6).

TCG does not believe that there should be any requirement for space utilization or "warehousing". The Commission can reasonably rely on the workings

of the competitive market to solve any problems of under-utilization of collocation spaces. That is, the Commission can rely on the interconnector's business judgement to determine if it wants to add (and pay for) more space, so long as it is available. In most cases, the degree of utilization of collocation space is not even a concern of the ILEC, so long as the customer is paying its bills. ILEC "warehousing" restrictions, however, could be very detrimental to the development of a "resale" type marketplace, since the use of resold ILEC loops to service customers can be very space intensive. Limits on the amount of space a collocator can use, therefore, act as an absolute ceiling on the number of customers that a collocator can serve from that office. Moreover, the more ILEC customers who are served by collocators, the less switching and network equipment the ILEC will need to handle the business at that office, thereby freeing up additional space for collocators. Therefore, there is no legitimate public interest in collocation space utilization restrictions unless all collocation space in an office is exhausted and all of the ILEC's space is efficiently utilized (under the same standards) and additional parties are requesting collocation space.

IV. UNBUNDLED NETWORK ELEMENTS ¶74-116

A. Role of the Commission in Setting Minimum Standards (NPRM ¶¶ 77-79)

TCG generally supports the Commission's preliminary conclusion that it should limit its initial efforts with respect to unbundling to the creation of a minimum set of unbundled essential elements. Elaborate specification of detailed

lists of unbundled elements would be extraordinarily time consuming and difficult. Rather, the Commission should establish a minimum baseline of unbundled elements as its "preferred outcome" for unbundling. TCG provides its recommendations on the content of that initial list below. The Commission should also establish a process, patterned on state ONA practices, whereby carriers can request additional unbundling, consistent with the pricing and unbundling principles of the 1996 Act and the Commission's relevant rules.

TCG also agrees that some national standardization of unbundled element technical requirements would be helpful. These standards should include the minimum performance characteristics of different types of local loops, in terms of loss, noise, bit error rates, and the like. It should also include performance objectives for installation and repair. And -- as explained in Part II.D -- it absolutely must include penalties for non-compliance with the standards. In the absence of "teeth," the best-intentioned performance standards become little more than wishful thinking.

B. Recommended Unbundled Elements ¶ 80-116

The Commission poses a number of questions regarding what unbundling requirements it should impose. TCG generally supports the Commission's proposed four-part unbundling plan (paragraphs 94-116), with one modification. TCG would distinguish between signaling systems, which are necessary to complete calls, and "ancillary systems," which are necessary for effective

interoperation of networks. TCG would therefore recommend that there be five major categories:

Loops

Switching Capacity

Transport

Signaling

Ancillary Systems

Loops. As the Commission recognizes, local loops were expressly cited in the Joint Explanatory Statement which accompanied the 1996 Act.[48] In addition, the 1996 Act specifically requires that access to local loop transmission must be made available as part of the competitive checklist for interLATA entry.[49] The Commission's objective in unbundling loop elements should be to define the costs associated with providing different types of local loop plant, with differentiation based on transmission characteristics, rather than use. In other words, a two wire copper loop used for residential service and a two wire copper loop used for a business customer would be a single unbundled item. Volume ordering and pricing characteristics should be reflected in the rates for loops.

Loops should be defined as transmission paths between the demarcation point at the customer's premises and the Main Distribution Frame ("MDF") at the

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48. NPRM at ¶ 94.

49. *See* §271(c)(2)(B).

wire center or central office. Loops should be available to support varying transmission characteristics, such as 3 KHz loops (typically used for Plain Old Telephone Service ("POTS"), 144 kbps capable loops (typically used to support ISDN), dry copper pairs (typically used for alarm circuits), with all necessary transmission parameters defined and performance objectives identified.

Switching Capacity. Tandem and end office switching capacity may require different rates, either per port or per switch module, if the capacity costs of the two types of switching are different.[50] Operator service, Automatic Intercept systems, E911 and 911 systems, and Directory Assistance would be included here as well.

In addition, the port charge should include, as an imputed cost, the intra-central office wiring and/or multiplexing equipment used to connect the switch port to the Main Distribution Frame in order to connect to the local loop. It is important to impute this intra-Central office portion of the facility in the port rate in order to ensure non-discriminatory pricing between users of ILEC switching and CLEC switching. ILECs have sought to discourage use of competitive switching and ILEC loops by making it very expensive to connect the ILEC loop to competitor transmission facilities. Since a purchaser of an ILEC loop that uses CLEC switching will have to connect the loop to a collocation or other interconnection facility at

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50. Basic unbundled switching capacity should not, however, be sold on a usage-sensitive basis, particularly in view of the fact that wholesale services and switched access will provide usage-sensitive alternatives for the use of switching capabilities in the ILEC network.

the central office using the same type of intra-central office facility that is used to connect to an ILEC switch, it is important that the costs of these two connections be equalized by imputing the costs incurred by the collocator to connect to the unbundled loop into the costs of the ILEC's unbundled switch capacity.

Transport. This includes basic interoffice trunking facilities, again without distinction as to the use of the facility but only its underlying transmission characteristics. The rates for transport should be expressed on a capacity basis wherever feasible.

Signaling. This would include connection to STPs, SCPs, SSPs, NCPs, SCNs, IPs, and the use of the associated databases. Among the databases to be included here would be customer information databases, 911 databases, directory assistance databases, LIDBs databases and systems, and the like. Transmission facilities used in connection with signaling can be included in the Transport category.

It is, however, important to move cautiously insofar as signaling and database interconnection and unbundling is concerned, due to the importance of these systems to network operation. For example, some parties have argued that ILEC Advanced Intelligent Network (AIN) components should be fully unbundled, so that these carriers can connect their own SCPs directly to ILEC SSPs. This type of unbundling makes the ILEC switch vulnerable to inappropriate routing and/or billing

instructions from the Competitor's SCP, potentially leading to traffic congestion, routing of calls to incorrect trunk groups, or incorrect billing records.

An alternative approach that still provides competitive connection to signaling capabilities is to require "mediated access" to these functions. In this context, mediated access refers to the ability of the ILEC to reasonably screen responses to ensure that instructions are provided within a defined permissible scope. Specific industry work will need to be undertaken to create standard definitions for these mediation interfaces and devices. The same mediation interfaces and devices will also be available to protect the CLEC networks. Competition between ILECs and competitive carriers to provide services to resellers, combined with these mediation devices, will provide resellers with feature rich, reasonably priced services, and will provide the public with a highly reliable, diverse public network that supports numerous competitive, differentiated service providers.

Ancillary Systems are an often overlooked but very important unbundling category, and would include the various operating and maintenance systems necessary for efficient and seamless interconnection of networks and provision of high quality services. Service order entry and status systems, trouble reporting and status systems, diagnostic, monitoring, testing of network reconfiguration systems, traffic data collection systems, and basic billing systems are among the ancillary elements that must be unbundled and opened to access by other

providers. Effective unbundling of these systems will greatly assist in ensuring timely, efficient, and quality provision of services by ILECs to other carriers. Unless modern, electronic access to these information systems is provided, competing carriers will be relegated to error-prone, slow, expensive and inefficient manual processes, while the ILEC will use its modern systems to provide comparable services to its own customers, placing the competitor at a distinct competitive disadvantage. Additionally, it is important that access to these systems be based on national system standards, in order to prevent the situation where dozens of incompatible operating systems are used. National standards setting bodies are attempting to develop national standards, and ILECs and CLECs should be encouraged to comply with such standards.

C. The Relationship Between the Pricing Standards for Unbundled Elements and Wholesale Services and the Illinois "Local Switching Platform" Proposal (NPRM ¶¶ 85,100).

The 1996 Act is clear in its requirement that unbundled network elements and wholesale services must be priced under different standards. Network elements must be priced based on costs,[51] while wholesale services are priced

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51. Section 252(d)(1) provides that "the just and reasonable rate for network elements...shall be (i) based on the costs (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable) and (ii) nondiscriminatory, and (B) may include a reasonable profit."1996 Act, §101, §252(d)(1).

based on retail rates less the costs that will be avoided.[52] Significantly, the pricing for unbundled elements cannot be set "with reference to" a rate of return or like proceeding and thus cannot be based on embedded costs, whereas most retail rates have been determined on a rate-of-return basis.

Proposals to use unbundled network elements (whose pricing standards fall under §252(d)(1)) to provide wholesale service offerings (whose pricing standards are governed by §252(d)(3)) are inconsistent with the 1996 Act's fundamental statutory plan. Provisioning of wholesale services using the unbundled elements pricing structure would essentially bypass the avoided cost pricing standard embodied in §252(d)(3), if resellers could obtain a lower overall price by purchasing unbundled network elements priced pursuant to §252(d)(1) rather than comparable wholesale services. This would, in effect, repeal both §§251(b)(1) and 252(d)(3), the statutory sections intended to govern wholesale discounts for resold local services.

It is a basic principle of statutory construction that one section of a statute cannot be interpreted in a way that acts to nullify another section.[53] Allowing

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52. Section 252(d)(3) provides that "a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 1996 Act, §101, §252(d)(3).

53. *See Freytag v. Commissioner*, 501 U.S. 868, 877, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991) ("Our Cases consistently have expressed a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment."); *Pennsylvania Dep't of Pub. Welfare v.*

parties to assemble unbundled elements, priced at a rate different from the statutory standard for wholesale rates, in such a way as to replicate the wholesale product, would clearly undermine the explicit statutory intent that the wholesale price should be directly based on retail prices. This statutory intent cannot be regarded as inconsequential or unintentional. Rather, it is at the heart of the statutory scheme, which is designed to encourage the development of facilities-based local competition. Congress clearly intended to encourage the development of facilities-based local competition by providing unbundled elements on a cost basis, to be assembled into a facilities-based alternative, while providing for the consumer convenience of "one stop shopping" through the use of wholesale services.

Since there is no way to harmonize the wholesale pricing requirements of the 1996 Act with a proposal to use unbundled elements to replicate and underprice that alternative, the Commission cannot permit the mis-use of unbundled elements to underprice the wholesale product. The Commission should

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Davenport, 495 U.S. 552, 562, 109 L. Ed. 2d 588, 110 S. Ct. 2126 (1990). *See also Communications Workers of Am. v. American Tel. & Tel. Co.*, 309 U.S. App. D.C. 170, 40 F.3d 426, 435 (1994) ("We will not accept a reading of [an Article's] second sentence that would render the first sentence meaningless ...."); *cf. Citizens to Save Spencer County v. United States EPA*, 195 U.S. App. D.C. 30, 600 F.2d 844, 870 (1979) ("... we are guided by the rule that the maximum possible effect should be afforded to **all** statutory provisions, and, whenever possible, **none** of those provisions rendered null or void.") (emphasis added). *See generally In re Application of Winnebago Coop.; Tel. Ass'n.*, 5 FCC Rcd 1247 (1990) (rules of statutory construction prohibit an interpretation of Commission Rules such that they cannot stand together).

therefore provide that, when a carrier uses an assemblage of unbundled elements that collectively replicates a wholesale service offering, the wholesale service price must be applied rather than the sum of the unbundled element prices.[54] In a related vein, the Commission mentions the local switching platform ("LSP") proposal from Illinois as one possible model for unbundling, and notes that the LSP would appear to permit the use of unbundled elements as an alternative to a wholesale product. TCG does not believe that this model is appropriate for the Commission to use.

The LSP concept was first introduced by Illinois Commerce Commission ("ICC") Staff in ICC Docket No. 95-0458, relating to Petitions filed by AT&T and LDDS seeking alternatives for local resale. The LSP is a modified version of LDDS WorldCom's "total wholesale network service" unbundling proposal, whose name indicates that it is in fact a wholesale product, not an unbundling proposal.

The ICC Staff's theory is that the local exchange network is comprised of three separate components: loop, local switch and transport. The theory is that

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54. This approach would also be consistent with the general rule of statutory construction that a specific statutory provision prevails over a general provision within the same statute. *See National Labor Relations Board v. A-Plus Roofing, Inc.*, 39 F.3d 1410, 1415 (9th Cir. 1994) ("It is a well-settled cannon of statutory interpretation that specific provisions prevail over general provisions."). *See also Sierra Club v. Lujan*, 931 F.2d 1421 (10th Cir. 1991) ("A specific statutory provision will govern notwithstanding the fact that a general provision, standing alone, may include the same subject matter.") Since the wholesale pricing rule in §252(d)(3) is quite specific with regard to the price that should be applied to the purchase of a wholesale product, that more specific rule should take precedence over the more general pricing rule of §252(d)(1).

the local switch can be unbundled from the local exchange network into the Local Switching Platform. The LSP bundles all services provided on a switch on a per line basis, such as caller ID, call forwarding, call waiting, and the like. ICC Staff contends that resellers can purchase the LSP, unbundled loops and transport to provide end-to-end local telephone service. The ICC Staff has proposed that LSP be priced based on the long-run service incremental cost, or LRSIC, for the switch, and proposed that it "may include a reasonable profit," based upon a pro rata share of contribution from switching services. The LSP also would provide for term and volume discounts. The term requirement would be set equal to the average length of time for a reseller to order and install its own switch (nine months to 2 years). The level of discount from retail rates would be approximately 18% under the LSP, whereas the avoided cost method for a wholesale price results in a discount of about 8%.

The LSP proposal is not consistent with the 1996 Act. Application of the LSP proposal would be an obvious circumvention of the §252(d)(3) avoided cost standard for the pricing for local wholesale services. While the LSP is presented as an unbundling proposal, it is in reality a *bundling* proposal, and thus is a substitute for local wholesale resale service offerings. A reseller can buy the LSP, along with transport and loops, and provide completely transparent local exchange services without the need to purchase a wholesale service offering from the LEC. Moreover, the effective discount is greater than the discount resulting from

applying an avoided cost standard, and thus the conflict between the two statutory sections is clearly presented.

V. PRICING OF INTERCONNECTION, COLLOCATION, AND UNBUNDLED NETWORK ELEMENTS (NPRM ¶¶117 - 157).

A. Would a lack of consistent rates create a barrier to entry or to deployment of facilities throughout a multistate market? (NPRM ¶¶ 117-120)

TCG supports the Commission's conclusion that it possesses authority to adopt pricing rules (or "preferred outcomes") to ensure that rates for interconnection, unbundled network elements, wholesale services, and Transport and Termination meet the requirements of the 1996 Act. Indeed, the 1996 Act specifically directs the Commission, without limitation, to develop rules to implement §251, which incorporates these pricing rules.[55]

The Commission's central role in these issues is well recognized. Many state commissions have delayed state proceedings to await action by the Commission,[56] while others have initiated inquiries into the implementation of the 1996 Act.[57] Significantly, some ILECs have attempted to erode the progress

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55. *See* §251(d)(1).

56. *See, e.g., Utah Interconnection Docket*, Docket No. 95-2206-01 (Utah Public Service Commission).

57. *See, e.g., Oregon NPRM on Interconnection*, Docket No. FCC 96-98, Order No. FCC 96-182 (Oregon Public Utility Commission). *See also, In Re Proposal Statement of Inquiry (CR-101), Implementation of the*